

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Framework for Broadband Internet Service

GN Docket No. 10-127

A National Broadband Plan for Our Future

GN Docket No. 09-51

**COMMENTS OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) hereby submits these Comments in response to the Federal Communication Commission's (FCC) Public Notice of Inquiry issued on June 17, 2010 (the *Title II Reclassification NOI*). The FCC set deadlines of July 15, 2010, and August 12, 2010, for filing Comments and Reply Comments, respectively.

The PaPUC appreciates the opportunity to file Comments. As an initial matter, the PaPUC Comments should not be construed as binding on the PaPUC in any proceeding before the PaPUC. Moreover, these Comments could change in response to subsequent events. This includes a later review of other filed Comments and legal or regulatory developments at the federal or state level.

The *Title II Reclassification NOI* asks a very basic, and critically important, question about the regulatory classification of the "internet connectivity service" component of "broadband internet service" under state and federal law. The FCC's resolution of this legal issue, particularly after the federal court's decision in *Comcast v. FCC*, 600 F.3d 642 (DC Cir. 2010) (*Comcast*) effectively voided the FCC's reliance on

Title I ancillary authority, is critical to pending consideration of the National Broadband Plan and, equally important, deployment and delivery of advanced telecommunications and information services to all Americans.

Before *Comcast*, the FCC relied on Title I ancillary authority to impose “telecommunications like” obligations on Voice over Internet Protocol (VoIP) providers (such as Local Number Portability, Universal Service support, and Telecommunications Relay Service). Moreover, the FCC also relied on the statutory provisions governing Communications Assistance for Law Enforcement Agencies (CALEA) in determining, in part, that VoIP was a “successor technology” to traditional telecommunications.

The FCC now asks if: (1) this current “information service” classification remains adequate to support effective performance of the FCC’s responsibilities; (2) classifying the “internet connectivity service” component of broadband service as a “telecommunications” service and applying *all* the requirement of Title II is appropriate; and (3) a “third way” is appropriate in which the FCC would classify the “internet connectivity service” as “telecommunications” *but* forbear from applying *all* provisions of Title II except for those needed to implement universal service, competition and small business opportunity, and consumer protections.¹

The PaPUC applauds, and supports, the FCC’s willingness to address this controversial, but fundamental, legal question.

The PaPUC supports a modified common carriage approach, albeit one that does not preempt state law or forbear from state responsibilities for ensuring telecommunications or telecommunications service to the extent that this “internet

¹ *In re: Framework for Broadband Internet Service*, Docket No. 10-127 (June 17, 2010), para. 2.

connectivity service” is intertwined with legitimate state concerns. This is consistent with the PaPUC’s prior filings.²

The FCC is fully aware that the PaPUC’s refrain on universal service has been that Early Adopter states must not be penalized for undertaking efforts at promoting competition, ensuring open access, and reforming local rates, lowering access rates, and creating state universal service funds before other states or the FCC. The FCC can accomplish all of the professed goals in the *Title II Reclassification NOI* in a manner that preserves, and does not undermine or harm, state law.

The PaPUC has consistently stated that a primary way to achieve these goals is by preserving the common carriage approach.³ Common carriage provides legal certainty, ensures joint jurisdiction, and allows state commissions to address local concerns in a cost effective manner compared to relegating all telecommunications matters to the FCC.

Of course, the PaPUC recognizes that the traditional panoply of pricing and tariffing in place under the current common carriage approach may not be appropriate.⁴ The PaPUC, however, maintains that modified common carriage is necessary so that all providers seeking to deliver services to customers over the PSTN, albeit a Public Switched Transportation Network or a Packet Sending Transmission Network, will be shouldering an appropriate portion of the total FUSF and, now, network access.⁵

The PaPUC suggested then, and repeats today, that a modified form of common carriage might well be the most effective, if not the only, way of providing open access to all facilities and ensuring support for whatever programs the FCC decides to support

² *In re: High-Cost Universal Service Support and Federal-State Joint Board*, Docket Nos. 05-337 and 96-45 (April 17, 2008) (hereinafter PaPUC Comments).

³ PaPUC Comments, p. 22.

⁴ PaPUC Comments, pp. 22-23.

⁵ PaPUC Comments, p. 22.

from the FUSF.⁶ This may well come to include broadband deployment and/or support for broadband services under the National Broadband Plan or its successors.

The PaPUC's support for a modified common carriage is not without limits. For one thing, the diversification in the current communications market may prevent the imposition of mandatory minimums on every device or service while, at the same time, the imposition of federal maximums could discourage investment. Consequently, the FCC may have to limit the scope of any "internet interconnectivity" classification.

For another thing, the PaPUC notes that the *Title II Reclassification NOI* lists several provisions of federal law governing universal service, public safety, access by persons with disabilities, privacy, homeland security, and harmful internet practices i.e., unreasonable disruption practices or secret interruptions.⁷ However, the FCC's NOI is significant in its silence on whether any state authority, as an historic joint regulator of "telecommunications" under state and federal law, will continue to apply to this proposed "broadband interconnectivity" service.

The PaPUC is gravely concerned, and could not support, a result in which the FCC preempts the states or reaches a forbearance decision that leaves the states with no viable role. An FCC decision that reclassifies the "broadband interconnectivity service" as "telecommunications" or "telecommunications service" must respect state law.

Several reasons support this approach. First, the PaPUC recognizes that traditional Title II regulation may be unworkable in today's technological market and possibly contravene existing state law if authority retained by the states is overturned by the FCC.⁸ Also, the PaPUC doubts that even the FCC's expansive authority under Title

⁶ *PaPUC Comments*, pp. 22-23

⁷ *In re: Broadband Internet Service*, Docket No. 10-127 (June 17, 2010), para. 32, 39, 40, 41, 42.

⁸ *VoIP Freedom Act*, 73 Pa.C.S. § 2251.1.

II and preemption or forbearance can include servers or routers connected to the United States network through nodes located in Europe, Asia, or Latin America. Moreover, states have restricted rate regulation and consumer protection for Internet Protocol (IP) or VoIP retail services. Consequently, any FCC action must be cognizant of these realities and avoid preemption or forbearance that overrides state law or prevents a state commission from participating in federal efforts.

However, the FCC's proposal for a "modified common carriage" is consistent with the federal definition for "information service" and the exception to the exclusion for "information service" under federal law. The definition holds that a change in protocol related to the management, control, or operation of a telecommunications system or the management of a telecommunications service is not "information service" but, instead, becomes telecommunications under federal law.⁹

The FCC's decisions interpreting Pennsylvania law view Pennsylvania law as consistent with federal law.¹⁰ In turn, the PaPUC relied on FCC interpretations of federal law to avoid preemption or forbearance for decisions made under state law.¹¹

Consequently, the FCC and the state commissions would be within the confines of this "exception to the exclusion of information service" if a provider is changing protocol to facilitate communications over the PSTN, albeit a traditional or modernized PSTN. This same provision preserves the "joint jurisdictional" approach that has been a hallmark

⁹ *Title II Reclassification NOI*, para. 59, n. 170.

¹⁰ *Fiber Technologies v. North Pittsburgh*, File No. EB-05-MD-014 (February 23, 2007) (*Fiber Technologies*).

¹¹ *Palmerton Telephone Company v. GNAPs*, Docket No. C-2009-2093336 (March 16, 2010); Application of *Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, Docket No. A-310183F0002AMA, A-310183F0002AMB, A-310183F0002AMB (December 1, 2006).

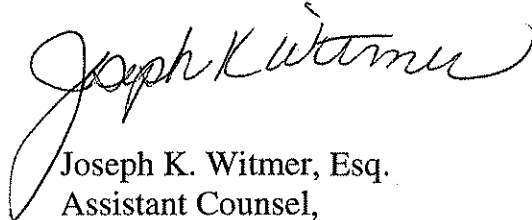
of regulatory oversight for network facilities, “telecommunications,” and “telecommunications service” under state and federal law.¹²

Finally, a modified common carriage approach that retains state authority better reconciles the FCC’s preservation of federal authority to ensure open access with state jurisdiction. Of necessity, moreover, a federal solution that preserves state authority must address the difficult questions of consumer protections and federal support for state work on federal goals, particularly the difficult issue of authorizing the states to impose a modest assessment on interstate revenues in support of federal efforts.¹³

The PaPUC appreciates the opportunity to file these Comments. The PaPUC reiterates that the positions taken in these initial Comments are general and may change, particularly following review of the other filed Comments.

Respectfully submitted,

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¹² *Fiber Technologies*, para. 12 and 15.

¹³ PaPUC Comments, pp. 16-17.